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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY A. FOSTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 14A01-0701-CR-56
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Dean A. Sobecki, Judge
Cause No. 14D01-0512-FD-1140

July 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jeffrey A. Foster ("Foster") appeals his conviction for operating a vehicle while suspended as an habitual traffic violator ("HTV"), a class D felony.

We affirm.

ISSUE

1. Whether the evidence was sufficient to sustain the conviction.
2. Whether the trial court properly denied the motion to correct error.

FACTS

In December of 2005, Sergeant Kevin Buckley ("Buckley") of the Washington Police Department was drinking coffee at a Marathon Gas Station when he saw a white van with red stripes pull into the parking lot. Sergeant Buckley observed a man get out of the van, via the driver's side, and walk into the gas station. After taking a closer look at the man, Sergeant Buckley realized that the man was Foster. Sergeant Buckley was very familiar with Foster and knew Foster did not have a valid driver's license. Sergeant Buckley radioed the police station for a driver's license check.

The dispatcher notified Sergeant Buckley that Foster's license was indeed suspended;[1] he prepared an affidavit of probable cause ("affidavit"), which was sent to the prosecutor's office. On December 29, 2005, the State charged Foster with driving while suspended as an HTV. The information and affidavit were also filed on that same date. The trial court set bond and issued an arrest warrant; however, Foster was not arrested until April 28, 2006. Foster appeared in court on May 23, 2006, without counsel

[1] During trial both parties stipulated that "Foster was a habitual traffic violator as of December 23rd or 24th of 2005." (Tr. 44, 45).

for his initial hearing. The trial court appointed Blake Chambers as Foster's counsel. The trial court set the omnibus date as June 6, 2006, and the date of trial as September 27, 2006.

Foster's counsel filed notice of alibi on August 23, 2006, requesting a specific statement in regards to the exact date, time, and location of the offense, and asserting that he was at 310 Williams Street, Washington, Indiana, on the date of the alleged offense. However, he did not state whether Foster was in the presence of anyone while inside the residence, and the State did not respond to the notice of alibi. Foster filed a waiver of jury trial on September 20, 2006, and the court heard the trial.

During the course of trial, Sergeant Buckley identified Foster in open court and testified that he had observed Foster driving a red and white van on December 23, 2005. Sergeant Buckley conceded during cross-examination that, based upon the activity report, the incident probably took place on December 24, 2005, which the dispatcher also conceded to during trial. Subsequently, Sergeant Buckley's affidavit and the dispatcher's activity report were admitted into evidence. Sergeant Buckley's affidavit reported that the incident occurred on December 23, 2005. During cross-examination, Foster's counsel asked Sergeant Buckley about the discrepancy between the dates on the affidavit and the activity report. Foster did not present any specific evidence that he was at 310 Williams Street on the 23rd of December. The trial court found Foster guilty and entered judgment of conviction.

Approximately one month later, on October 26, 2003, Foster filed a motion to correct error seeking a new trial based on newly discovered evidence. The court did not rule on the motion to correct error and, thus, it was deemed denied.

DECISION

1. Sufficiency

Foster argues that there was insufficient evidence to sustain his conviction for operating a vehicle as an HTV. We disagree.

When addressing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). Moreover, we "must consider only the probative evidence and reasonable inferences supporting the verdict." *Id.* Thus, we "must affirm" if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

A person who operates a motor vehicle "while the person's driving privileges are validly suspended . . . and the person knows that the person's driving privileges are suspended . . . commits a class D felony." Ind. Code § 9-30-10-16(a)(1). Thus, the elements of the crime are: 1) operating a motor vehicle; 2) while driving privileges are suspended; and 3) a showing that the defendant knew that his driving privileges had been suspended as a result of his habitual traffic offender status. A single eyewitness is sufficient to sustain a conviction. *Bowlds v. State*, 834 N.E.2d 669, 677 (Ind. Ct. App. 2005).

Foster first argues that "[s]ince the officer did not pursue the vehicle nor stop the vehicle while it was being operated, one cannot make a 'reasonable inference' that he

was operating the vehicle." Foster's Br. at 4. However, he provides no authority for the proposition that a conviction for driving must be supported by evidence that an officer pursued or stopped a vehicle while it was being operated. In *Carpenter v. State*, 743 N.E.2d 326 (Ind. Ct. App. 2001), *trans. denied*, the evidence established that the eyewitness, Officer Dale Holbert ("Holbert"), saw Carpenter drive past. Officer Holbert knew Carpenter and knew that Carpenter's license was suspended as an HTV. A few days later, Carpenter was charged with operating while suspended as an HTV. This court held that the evidence was sufficient to support Carpenter's conviction.

Further, Foster argues that the evidence admitted during trial showed that the van that Sergeant Buckley observed had darkly tinted windows, thus obscuring Sergeant Buckley's view inside. However, this argument asks that we reweigh the evidence, which we will not do. *McHenry*, 820 N.E.2d at 126.

Sergeant Buckley testified at trial that he observed Foster driving the van and that "[i]t was beyond a doubt Mr. Foster." (Tr. 10). Sergeant Buckley knew Foster because he had dealt with Foster and Foster's "identity had become known to him over time." (Tr. 9, 10). Sergeant Buckley also knew Foster did not have a valid driver's license, and documentary evidence that Foster's license was suspended was admitted. This evidence is sufficient to support the trial court's verdict.

2. Motion to Correct Error

Foster argues that the trial court improperly denied his motion to correct error. In his motion, he asserts that "newly discovered evidence of [Foster's] whereabouts on December 24, 2005, demonstrates actually innocence," because the State had alleged in

the information and the affidavit that Foster had "operated a vehicle on December 23, 2005, but the State presented evidence at trial that [he had actually] operated a vehicle on December 24, 2005." (App. 13, 14).

The trial court is vested with the discretion to deny a motion to correct error that seeks a new trial based on newly discovered evidence. *Bradford v. State*, 675 N.E.2d 296, 302 (Ind. 1996), *reh'g denied*. "On appeal, the denial of a motion based on newly discovered evidence will be reversed only upon a showing that the trial court abused its discretion and the defendant has to show that the newly discovered evidence meets the standard for a new trial." *Id*. A new trial based on newly discovered evidence requires the movant to show that:

> (1) the evidence has been discovered since trial;
> (2) it is material and relevant;
> (3) it is not cumulative;
> (4) it is not merely impeaching;
> (5) it is not privileged or incompetent;
> (6) due diligence was used to discover it in time for trial;
> (7) the evidence is worthy of credit;
> (8) it can be produce upon a retrial of the case; and
> (9) it will probably produce a different result at retrial.

Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000). This court "analyzes these nine factors with care, . . . newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized." *Id.*

It is well established that one of the requirements for granting a request for a new trial on the "basis of newly discovered evidence is that due diligence was used to discover it in time for trial." *Cansler v. State*, 281 N.E.2d 881 (Ind. 1972). When a defendant is in possession of evidence but fails to bring forth such evidence at trial, he

cannot bring forth that evidence subsequent to an unfavorable verdict and assert it as the basis for a new trial. *See Allen v. State*, 791 N.E.2d 748, 754 (Ind. Ct. App. 2003).

In *Cansler*, we held that the defendant's assertion of newly discovered evidence, namely, his finding an alibi witness, was not new evidence because the alleged alibi witness's proposed testimony was vague, conclusory and not sufficient to compel any action by the Court. After the verdict and his conviction, Cansler alleged that one of his alibi witnesses had been found since the trial. Similar to Cansler, whose alibi witness came forward after Cansler was convicted, Foster's potential alibi witness also came forward after the trial and alleged that Foster was at her apartment located at 310 Williams Street, Washington, Indiana, on December 24, 2005, and that she would "be available for a retrial of the case." Foster's Br. at 11-12. Pursuant to *Cansler*, this evidence is not sufficient to warrant our reversal of the trial court's denial of his motion for a new trial. *Cansler*, 281 N.E.2d at 884.

In addition, the evidence here regarding the discrepancies in the date of the offense was apparently discovered before trial. Foster's counsel elicited Sergeant Buckley's testimony based on the date shown in the activity report. Further, Foster had subpoenaed the dispatcher to testify as a witness for the defense, and he elicited her testimony regarding the actual date of the incident. Therefore, Foster's alibi witness would be merely an attempt to impeach Sergeant Buckley's testimony regarding the date of the incident. *See Carter*, 738 N.E.2d at 671 (must show newly discovered evidence is not merely impeaching).

Further, Foster argues that his newly discovered evidence might have been relevant to show that Foster was at a specific location at the time of the offense and would have produced a different result at retrial. Although this testimony might have weakened the State's case, it is highly unlikely that the testimony would have produced a different result. Therefore, we find that the trial court did not abuse its discretion in denying Foster's motion to correct error seeking a new trial based on newly discovered evidence.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.